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In the

Supreme Court of the United States

October Term, A.D. 1965

No. 4781

UNITED STATES OF AMERICA,

Respondent,

vs.

VILLAGE OF ALSIP,

Petitioner.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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VILLAGE OF ALSIP,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Village of Alsip, a municipal corporation, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit was entered April 28, 1965 and a petition for rehearing was denied May 26, 1965. The opinion of the court below appears as Appendix A to this petition.

JURISDICTION.

The judgment of the court below was entered April 28, 1965 and a petition for rehearing was denied May 26, 1965.

The jurisdiction to review the judgment below is invoked under Rule 19 (B) of the Rules of the Supreme Court of the United States and under Title 28, Section 1254 (1), U.S.C.A.

QUESTIONS PRESENTED.

1. Was there money, indebtedness or any other form of property in the hands of Alsip belonging to the taxpayers when the lien of the government attached?

A. Was there any legally adopted contract between Alsip and the taxpayers?

B. Was there an implied obligation on Alsip to pay the taxpayers arising out of the delivery of the water system to Alsip when Santry completed it and had not been paid by the taxpayers?

C. Was Alsip estopped to dispute the validity of a contract with the taxpayers when it had received the benefit of the water system Santry had constructed but the taxpayers had not paid him for?

D. Did the admissible evidence in the depositions establish a contract between Alsip and the taxpayers?

E. Was there a debt here from Alsip to the taxpayers on which the Government can recover?

F. Was not the government estopped to deny the fact that Alsip had a contract with Santry?

G. Was there any ratification of a contract between Alsip and the taxpayers?

H. Was Alsip liable in assumpsit to the taxpayers after paying Santry?

I. Could the taxpayers recover against Alsip on any form of contractual indebtedness when they had not paid Santry?

J. Does not the government stand in the shoes of the taxpayers so that it cannot recover because the taxpayers could not recover against Alsip?

K. When the attorney for Alsip twice requested the right to argue the rights of Alsip when the summary judgment was obtained and was denied such right, can it be said that he waived the rights of Alsip as set out in the above points?

2. If, for purposes of argument, it is conceded that the taxpayers had a contract with Alsip by ratification or otherwise, was not Santry a subcontractor and did not the payment by Alsip to Santry entitle it to credit and prevent the government having the right to a judgment therefor together with interest.

A. Did not Santry have a lien and did he not perfect it under Sec. 23 Ch. 82 Ill. R. S.?

B. Even if the government had a lien prior in time (which it did not), would not the furnishing of materials and the serving of notice of lien claim give Santry precedence over the government, under Illinois cases?

C. After service of notice of lien (after furnishing labor and materials to a municipality) would not the officials of Alsip have been liable both civilly and criminally had they paid the taxpayers or the government rather than Santry?

D. Did the provision in the contract between the taxpayers and Santry amount to a waiver of lien so that Alsip could not pay Santry and he could not take payment from Alsip?

3. Was interest properly awarded under the facts in this case?

4. Were there not genuine issues of fact in the record which should have prevented the Court from awarding summary judgment?

5. Are not the federal and state authorities in favor of Alsip in this case?

STATUTORY PROVISIONS INVOLVED.

Federal Statutes:

Secs. 6321, 6332 (b) and 7401 I.R.C., 26 U.S.C.A.

Rules 8 and 56 Fed. Rules of Civil Procedure.

State Statutes:

Section 23, Ch. 82 Ill. R.S. Title: Liens

Section 30, Ch. 82 Ill. R.S. Title: Liens

Section 449, Ch. 38 Ill. R.S. Title: Criminal Law.

STATEMENT OF THE CASE.

An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit from the entry of judgment on behalf of the Plaintiff against Defendant Village of Alsip on the motion of the Plaintiff for Summary Judgment for the sum of $65,364.58 plus interest in the amount of $24,751.73; and further that $6,381.06 held by the Clerk of the District Court be applied in partial satisfaction of said judgment and that $32,000.00 or said judgment might be satisfied by the application of certain funds received from the City of Chicago when and if received by said Defendant.

Said judgment was entered on the Complaint, Answer, two discovery depositions and exhibits therein and on Defendant's exhibits filed at the time of application for summary judgment. No hearing on the merits was had.

The Circuit Court of Appeals modified said judgment by reducing the amount of interest to $12,626.82 and, further, by decreeing that the Village of Alsip satisfy said judgment to the extent of $32,000.00 as said amount was received from the City of Chicago and to the extent, if any, that the City of Chicago does not pay $32,000.00 to the Village of Alsip, said judgment of $65,324.58 shall be reduced by said amount not so paid. Otherwise said judgment was affirmed.

For simplification, Defendants Alfred H. Rado and Joyce B. Rado will be designated herein as "taxpayers"; Defendant Village of Alsip as "Alsip"; and Santry Construction Company as "Santry".

In stating the following facts, an attempt will be made to state them in chronological order.

1955:

The taxpayers owned a large area of land within the confines of the defendant Alsip and divided it into the Homecraft Subdivision. The man from whom they purchased this land was one John Benck who was President of the Board of Trustees of defendant Alsip at the time when the negotiations hereinafter are set forth.

1955:

At this time there was no underground water system in said subdivision and since the Chicago water systems did not extend even to the Village limits of defendant Alsip, it was necessary for negotiations to be conducted with the City of Chicago to extend the water system of the City of Chicago to the boundary between the City of Chicago and defendant Alsip.

1955:

The taxpayers negotiated with the City of Chicago which agreed to extend its water system to the Village limits for the sum of $48,000.00. The taxpayers, on September 20, 1955 (App. 15; Rec. 34) advanced to defendant Alsip $32,000.00 of that sum to be transferred by it to the City of Chicago and another corporation advanced the other $16,000.00. Defendant Alsip promptly transmitted said sum to the City of Chicago for the purpose above set forth. No ordinance or resolution or other legal promise of repayment to the taxpayers was secured by them or given to them by Alsip. (App. 5; Rec. 8-9) (App. 20; Rec. 90). When the City of Chicago had extended its water system to the boundary line as aforesaid, Defendant Alsip advertised for bidders for the construction of an extension of the water main

from the said boundary line to the subdivision of Defendant taxpayers and Santry was the low bidder.

10/15/55:

For some reason Defendant Alsip did not care to enter into a contract directly with Santry but told Santry to contract with the taxpayers. Defendant taxpayers then entered into a contract with Santry on October 15, 1955 for said work. (App. 16-17; Rec. 36-61 in Government's Exhibit 2 Rado Deposition) This contract contained the following provision:

> "It is understood the contractor (Santry Construction Company) is to look to the Homecraft Construction Company (taxpayers), 2136 West 51st Street, Chicago 9, Illinois, herein called the Owner, for payment of said work, and that the Village of Alsip is not to be liable in any manner for payment of said construction."

At the time the taxpayers entered into their contract with Santry and had the negotiations herein, they were represented by attorneys. (App. 20, Rec. 99-100). The taxpayers neither solicited bids nor selected the contractor Santry. Both of these things were done by Defendant Alsip, which required a performance or completion bond of Santry (which he furnished) and, by ordinance, gave Santry permission to do the work.

Plaintiff's exhibit 1 to the Sterba deposition recites that Defendant Alsip had awarded a contract to Santry for the construction of this water main in question for the original amount of $57,295.08.

Taxpayers Rado owed Defendant Alsip actually or contingently:

A. $15,300 for building permits for their subdivision
B. 1,220 for sewer repairs
C. 9,800 for street lights

$26,320 total indebtedness by taxpayers Rado to Defendant Alsip

11/15/55:

On this date the City of Chicago and Defendant Alsip are alleged to have entered into a contract for the bringing of the water lines to the Village limits for said amount of $48,000.00 with the further provision that 25% of the future water bills of the defendant Alsip paid to the City of Chicago should be refunded until said $48,000.00 had been repaid; it being the understanding that it was merely a conduit in the receipt of this 25% which should be, in turn, paid by it to taxpayers and the other corporate contributor pro rata. (App. 33, Rec. 135).

1/17/56:

The Village Engineer issued an estimate of work done by Santry on the water system in the amount of $12,900. A paid stamp dated February 6, 1956 appears (App. 16-17, Rec. 57).

2/6/56:

Defendant Alsip's Village Engineer on this date made a second estimate of work done on the water system in the amount of $15,700.00. Paid stamp appears dated April 11, 1956. (App. 17, Rec. 58).

Both of these estimates were paid by the taxpayers and comprised the sum of $28,600.00 which will be referred to later.

6/8/56:

Final estimate for labor and material furnished by Santry on the water system in the amount of $31,044.58.

Note: All labor and materials were furnished before any tax liens were filed by the government.

Income taxes for the years 1954-59 and WH FICA taxes for the years 1953-57 accrued against the taxpayers in favor of the Plaintiff in the amount of $51,655.33.

9/20/57:

The District Director of Internal Revenue served the first notice on Defendant Alsip of the levy of a lien for taxes due. (App. 6, Rec. 10).

This date showed the following status:

1. The water system had been completed prior to this date, at an estimated cost of $59,644.58. (App. 17, Rec. 59-60)

   A. $28,600 had been paid by taxpayers Rado.

   B. $31,044.58 remained unpaid.

12/12/57:

The District Director of Internal Revenue filed with the Defendant Alsip a second notice of tax levy for the amount stated in the first notice and an additional amount of $29,269.22. (App. 67, Rec. 11).

9/20/58:

Defendant Alsip approved two bond issues: One for $50,000.00 to purchase the existing water system, the second for $175,000.00 to make improvements and extensions. (App. 32-33, Rec. 131-135).

10/9/58:

Santry filed a notice of lien under Section 23 of Chapter 82 of the Illinois Statutes for a lien on the proceeds allegedly due to taxpayers in the amount of $31,044.58, being the unpaid balance for the construction of the water system. (App. 49, Rec. 267).

10/28/58:

Santry filed his suit against Defendant Alsip and taxpayers Rado for the balance due him in the amount of $31,044.58 and costs and prayed a lien on all monies due tapayers Rado. (App. 45-50, Rec. 236-267½).

1/15/60:

The District Director of Internal Revenue filed a final notice of lien with the Village of Alsip again demanding the sum owing by taxpayers Rado. (App. 7, Rec. 11).

1/15/60:

In the meantime the City of Chicago had been refunding to the Village 25% of the net billing of water supplied to Defendant Alsip. On February 20, 1960 this sum amounted to $4,101.06. (App. 124; Exh. 1 to the Sterba Deposition).

On the same date the Village had the proceeds of the bond issue in its hands the sum of $52,250.00 as the proceeds of the sale of 50 $1,000.00 bonds for the purchase of the existing water mains and $175,000.16 from the sale of water works improvements bonds to pay the cost of constructing, improvements and extensions to the existing water system. (App. 32-3; Rec. 31-4). No ordinance provided that these funds were to be paid to taxpayers.

These bond issues were to be paid from general funds and not from special funds, such as income from water furnished. They were general obligation bonds.

2/20/60:

On this date the threshold questions were:

1. Did Defendant Alsip have a contract with taxpayers?

2. Did Defendant Alsip have one with Santry?

3. Did it have in its hands $59,644.58 or $31,044.58 of it, which was property or rights of property to which the government was entitled in the place and stead of the taxpayers?

2/20/60:

In order to resolve conflicting claims, on February 20, 1960 the Village board passed a resolution on which the government relies to establish its position. (App. 124-5; Exhibit 1, Sterba Deposition).

In this resolution the Village Board officially made clear its understanding of its position on several issues, viz:

First: It found that taxpayers had advanced $32,000.00 as a portion of the cost of bringing a water main from a point within the City of Chicago city limits to a point on the boundary line between the City of Chicago and the Village of Alsip.

The Board found that it had awarded a contract to the Santry Construction Co. for a consideration of $57,295.08 for the construction of the water main lying wholly within the Defendant Village to connect up with the water brought to the city limits aforesaid, and that it had directed Santry to enter into said contract with the taxpayers, d/b/a Homecraft Construction Co.

The Board found further that the Village Engineer has certified that the value of the work performed under said contract amounted to $59,644.58, of which $28,600.00 had been paid by the taxpayers.

The Board further found that the taxpayers, d/b/a Homecraft Construction Co., owed $15,300.00 for unpaid tap-on fees and $12,220.00 for improvement repairs in the subdivision and that the City of Chicago had refunded the sum of $4,101.06 of the $32,000.00 originally advanced. The Board applied said $4,101.06 to said two items of indebtedness and found that the balance due from taxpayers on said two items was $12,418.94 and that there were refunds due from the City of Chicago arising on the original investment of taxpayers in the sum of $27,898.94.

The Board then found that there was a further sum of indebtedness due from taxpayers for the installation of street lights in the amount of $9,800.00.

It will be noted that the net amount of the monies claimed to be due from the taxpayers after the application of $4,101.06 to the claims for tap-on fees and improvements, viz., $12,418.94 plus the $9,800.00 for street lights for taxpayers' subdivision and the $6,381.06 in the hands of the Clerk of the District Court adds up to the $28,600.00 which the taxpayers had advanced to Santry. The above three items owed by taxpayers for tap-on fees, sewer repairs and street lights to Alsip totaled $26,320.00.

Alsip could have paid the government the balance of $2,280.00 and handed over to the government the amount of $4,101.06 which it had accumulated in the form of refunds from the City of Chicago. For some reason the Board first applied the $4,101.06 refund to the reduction of 2 of the 3 items of indebtedness from taxpayers, namely $15,300.00 tap-on fees and $1,220.00 sewer repairs, which left a balance owed for those two items of $12,418.94. Having applied the refund from the City of Chicago to this indebtedness meant that Alsip had to increase the

amount to pay up the balance of the $28,600.00 advanced by taxpayers from the sum of $2,280.00 to $6,381.06. They did it the hard way.

The Board next found that the unpaid balance due to Santry in the amount of $31,044.58 should be disbursed to Santry from the proceeds of the water works bond issue and that Santry should dismiss proceedings pending as case No. 58 C 15338.

It further found that the sum of $6,381.06 be disbursed directly to the Bureau of Internal Revenue as the net amount of cash due under the tax levies theretofore made by the government. This gave the Plaintiff the $4,101.06 refunded by Chicago and the $2,280.00 balance due taxpayers from their payments to Santry less their indebtedness to Alsip.

The last paragraph of the resolution provided that the Internal Revenue Department was considered to be the beneficial owner of the said net amount of $6,381.06. The Village Board considered in this resolution that by paying up the balance of the amount of money the taxpayers had advanced on this project, that they settled the account with taxpayers. The $6,381.06 was paid into the office of the Clerk of the District Court where it now is held for the benefit of the government.

5/4/62:

Suit No. 62 C 945 commenced in the United States District Court.

1/14/64:

Summary judgment for $65,324.58 plus interest of $24,751.73.

2/13/64:

Notice of Appeal filed.

12/64:

As of December, 1964, Defendant Alsip has received a total of refunds from the City of Chicago in the amount of $11,824.24. Subtracting the sum of $4,101.06, a balance of $7,723.18 is left in the hands of Defendant Alsip, which, under the terms of the above resolution, is due to the government and which the Village is willing to turn over to it. After the $4,101.06 was paid in as a part of the $6,381.06, there was a balance due on refunds from the City of Chicago of $27,898.94. (App. 124-5; Exhibit 1, Sterba Deposition).

The government's theory is stated in its Point 2 in its argument before the Court of Appeals where it stated that it did not rely upon:

> "Agreements, written or unwritten, between the taxpayers and the Village officials to establish the Village's obligations to the taxpayers. The municipality's obligation arises only upon its subsequent ratification of these agreements since the officials lack power to create a liability against the municipality. It is the municipality's ratification that binds it to a contract and constitutes its offer or acceptance."

4/28/65:

Opinion rendered by the Circuit Court of Appeals.

8/24/65:

Last date to file petition for certiorari.

ARGUMENT.

I.

PETITIONER ALSIP CONTENDS THAT THE TAXPAYERS HAD NO MONEY OR PROPERTY IN THE HANDS OF PETITIONER ALSIP OR INDEBTEDNESS DUE TO THEM BY IT ON WHICH THE LIEN OF THE PLAINTIFF COULD ATTACH, AT THE TIME IT WAS LEVIED OR SUBSEQUENTLY THERETO, UNDER THE PROVISIONS OF SECTION 6321 I.R.C. 1954.

Whether a federal lien attaches to property of taxpayers is a two-step inquiry in which both state and federal law must be consulted: First, the state law to ascertain if there is any property belonging to the taxpayers; second, if property is found under state law, the federal law to ascertain if the taxes and lien therefor attached to said property, if there is any. If there is no property under state law, the second step is not taken.

These principles are enunciated in the cases of *In Re Halprin,* C.C.A. 3, 1960, 280 F. 2d 407, 409, 410; *Aequilino* v. *United States,* 1959, 363 U.S. 522; *U. S.* v. *Durham Lumber Co.,* 1959, 363 U.S. 522.

Alsip claims there was neither money, indebtedness or any other form of property in the hands of Alsip when the lien of the government attached and the judgment herein was entered.

A. There was in fact no legally adopted contract between Alsip and the taxpayers for taxpayers to build the water system.

At the time the alleged indebtedness of Defendant Alsip to the taxpayers was created, Ch. 24, Sec. 9-47, Ill. R. S. provided:

"The passage of all ordinances for whatever purpose, and of any resolution or motion (1) to create any liability against a city or (2) for the expenditure or appropriation of its money, shall require the concurrence of a majority of all members elected to the city council, including the mayor. * * * The yeas and nays shall be taken upon the question of the passage of the designated ordinances, resolutions, or motions and recorded in the journal of the city council."

No ordinance or resolution was passed and no yea and nay vote was taken or recorded with reference to these three items. Without the passage of an ordinance or resolution with a supporting yea and nay vote no legal obligations against the village could be incurred.

Chap. 24, Sec. 9-47, Ill. R. S. refers to cities. However, Article 1, Section 1-2 (9) of said act provides as follows:

"Whenever the words 'city council', 'aldermen', or 'mayor' occur in this act, the provisions containing these words shall apply to the Boards of Trustees, trustees and president, respectively, of village, and incorporated towns as far as these provisions are applicable to them."

The above sections are quoted from an act entitled, "An Act Concerning Cities, Villages and Incorporated Towns, and to Repeal Certain Acts Herein Named", approved August 15, 1941, Laws 1941, Volume 2, page 19 et seq.; effective January 1, 1942.

The act preceding the one of 1941 was an act entitled, "An Act to Provide for the Incorporation of Cities and Villages", approved April 10, 1872; in 4th July 1, 1872. Hurd's Laws, 1874, Ch. 24, Art. III, Section 13.

Section 13 of Article III of such former act (referred to in the last preceding paragraph) likewise used the words "mayor" and "city council" and the courts of Illi-

nois, in deciding village cases, held that the yea and nay votes required to be taken and recorded by said section applied to the ordinances or resolutions of village trustees. In the case of *Barr* v. *Village of Auburn,* 89 Ill. 361, 362, it was held that Section 41 of the Act of 1872 provided for a yea and nay vote in the case. Section 82 of the Act provided for the record of such vote. The Supreme Court in that case held that in this Village case, the requirement of yea and nay vote was mandatory. The same result was obtained in the cases of *Arnold* v. *Village of Ina,* 244 Ill. App. 239; *Selby* v. *Village of Winfield,* 255 Ill. App. 67, 73-5.

Construing the two sections of the statute together, it conclusively appears that yea and nay votes are required for village resolutions.

No yea and nay vote was taken nor any resolution or ordinance passed showing any contract of Alsip with taxpayers.

As above pointed out in this petition for certiorari, the Government admits that the village officials acting individually did not have the proper power in this matter to bind the Village of Alsip through any contract.

The contention of the Government that the Illinois statutes apply to cities and not to villages is repudiated both by the statutes themselves and the above decisions.

These principles are recognized in the following cases: *People* v. *C. and N.W. Ry. Co.,* 396 Ill. 466, 468, 469; *People* v. *Wabash Ry. Co.,* 377 Ill. 68, 73; *Selby* v. *Village of Winfield,* 255 Ill. App. 67, 73; *Buchanan* v. *Litchfield,* 102 U.S. 278; *Litchfield* v. *Ballou,* 114 U.S. 190.

Although the attorney for the defendant Alsip attempted to raise this and other questions in the District

Court at the time summary judgment was obtained, and was denied the said right (App. 42, 44), the Circuit Court of Appeals refused to pass on this important question, stating it was not raised below. (p. 7 of opinion) Alsip feels that this was a refusal to consider the merits and a reliance upon a technicality, constituted reversible error.

In its opinion the Circuit Court of Appeals repeatedly states that Alsip entered into a contract with the taxpayers. See par. 1, p. 3 of its opinion; par. 5, p. 3 id.; par. 2, p. 4 id; par. 1, p. 5 id; par. 4, p. 8 id.

WHERE IN THE RECORD IS SUCH AGREEMENT? None exists.

It cannot be established by the self-serving statements of Rado in his discovery deposition; nor by the hearsay reports of the auditors; nor by the answer of Alsip inadvertently filed without authority, as pointed out hereinafter. The fact that there was no contract was conceded by the Government in point II of its brief before the Court of Appeals. See 1, H infra.

The opinion of the Circuit Court of Appeals is based on the false assumption that such a contract existed or was ratified. This brings about a false conclusion and constitutes reversible error.

B. Where there is a failure to follow the statute or ordinance in binding a municipality by contract, no implied contract or implied liability arises against the municipality from the fact that labor and materials have been furnished the municipality and it has accepted the benefits.

These propositions are established in the cases of *Roemheld* v. *City of Chicago,* 231 Ill. 467, 471 (extra work

in the construction of two bridges); *Bituminous Casualty Corp.* v. *City of Harrisburg*, 315 Ill. App. 243, 251-2 (for insurance premiums due); *Galion Iron Works and Manufacturing Co.* v. *City of Georgetown*, 322 Ill. App. 498, 502-4 (rental of a road grader); *Selby* v. *Village of Winfield*, 255 Ill. App. 67, 73 (hiring an engineer); *Arnold* v. *Village of Ino*, 244 Ill. App. 239, 240 (construction of culverts in the village). NOTE: In all these cases the work had been done; the municipalities had received the consideration; but the Courts refused to hold them liable because there was no contracts entered into legally.

C. A municipality cannot be estopped to dispute the validity of a contract which it had no power to make for the reason that it has received the consideration.

The holding of the Circuit Court of Appeals is contrary to the Illinois cases and therefore is erroneous in deciding whether there was property in Alsip's hands.

The leading case in Illinois is *DeKam* v. *City of Streator*, 316 Ill. 123, 136-7, where a purported engineering contract was entered into and performed, where no appropriation was made therefor. Citizens brought suit to enjoin the City from paying for the work done.

Sec. 2 of Art. 7 of the Cities and Villages Act provided that city councils "may appropriate" etc.; and that such ordinance "shall specify the objects and purposes for which such appropriations are made." The statute did not specifically provide that cities were *prohibited* from entering into contracts without such appropriations nor that such contracts without appropriations were *void*. The Courts however have held that such contracts were void and that they are prohibited.

In the *DeKam* case the Court held:

> "The city council cannot be estopped to dispute the validity of a contract which it had no power to make, for the reason that it has received the consideration."

In construing the above statute the Court further held (p. 134):

> "Section 2 of Article 7 of the Cities and Villages Act is not a regulation of the mode in which the city may exercise its power to contract, but is a denial of the power and a prohibition of making any contract unless an appropriation shall have been previously made for the purpose. There was no attempt on the part of the municipal officers to override regulations for the exercise of a power, but there was an attempt to overrule the law which prohibited the exercise of the power."

On page 129 in the same case the Court further held:

> "A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it. The prohibition of the legislature cannot be disregarded by the Courts." (Citing authority).

Sec. 9-47 of the Cities and Villages Act (quoted above in A) is similar in form to that of Sec. 2, article 7 requiring appropriations construed in the *DeKam* case. As there held, the language of 9-47 Ill. R. S. should be held that it

> "• • • is a denial of the power and a prohibition of making any contract"

or incurring any liability unless there is a passage of an ordinance or resolution supported by a yea and nay vote.

The case of *Branigar* v. *Village of Riverdale*, 396 Ill. 534, 542, 72 N.E. 2d 201, cited on p. 8 of the opinion

of the Circuit Court of Appeals is not in point factually with the present case and for that reason is not controlling here.

In the *Branigar* case an ordinance was unanimously passed and an agreement was entered into between the Village of Riverdale and Branigar based thereon. 396 Ill. 534, 537.

The *Branigar* case was decided on the question of the validity of a contract for which there had been no appropriations, as in the *DeKam* case. The *Branigar* case was distinguished from the *DeKam* case by virtue of the fact that Branigar was to be paid out of special funds and not out of general funds of the Village as in the *DeKam* case. The Court held an appropriation was not necessary where payment was to be made out of special funds. The *DeKam* case was reaffirmed but distinguished. The issue pending in this case was not discussed.

An appropriation is a condition precedent to the existence of a contract where payment is to be made out of general funds, as here. Likewise, the passage of an ordinance or resolution supported by a yea and nay vote is a condition precedent to the creation of liability against a municipality. This point, however, was not raised below.

In *Hope* v. *City of Alton*, 214 Ill. 102, 106, an attorney sued for services rendered after he had been hired by the mayor and judiciary committee, and the city council, by resolution, ratified and confirmed the hiring and by another resolution authorizing the mayor to hire counsel. Sec. 108 of the ordinances of the City of Alton provided that the City of Alton should not be liable for legal services of any attorney except those performed by the corporation counsel or city attorney.

In an appeal from denial of recovery the Court said:

> "The doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations. (1 Smith on Mun. Corp. sec. 661). Persons dealing with a municipal corporation are chargeable with notice of its powers to contract, and the plaintiff was chargeable with notice of the ordinance in question. A municipal corporation is not estopped from denying the validity of a contract when there was no authority for making it. To hold otherwise would be to expose the taxpayer to all the evils which statutes or ordinances passed for his protection were designed to prevent. Cases where municipal corporations have been held to be estopped when acting in a private capacity in the performance of duties enjoined upon them are not in point in this case, both because the city had performed the duty by providing a law department, with officers to discharge its duties, and because the contract was directly prohibited by the ordinance."

In *Arnold* v. *Village of Ina*, 244 Ill. App. 239, 240, the president asked the plaintiff to construct culverts, promising that the village would pay if the state did not. There was no record of any meeting of the Village Board with regard to the employment of appellee. The Court on appeal by the village held:

> "Where a collection of individuals designated in a manner provided by law are created a body, to whose care public affairs are committed, the body so created is powerless to act except together and as a body, and where a record of its proceedings is required to be kept, such record is the only lawful evidence of its action, and it cannot be changed by parol proof. *People* v. *Chicago & E.I.R. Co.*, 306 Ill. 402.
>
> "If there is a statute prescribing the method by which an officer or agent can bind a municipal corporation by contract such method must be followed,

> and there is no implied contract or liability of such municipal corporation. *Roemheld* v. *City of Chicago*, 231 Ill. 467. It is quite evident, therefore, that Mr. Page had no authority to employ appellees. The village board could only create a liability against the village upon a yea and nay vote entered on the journal of its proceedings. The creation of a liability against the village in any other manner is expressly prohibited by the statute. Appellees contend that because the work was done and appellant has received the benefit of it, they should be allowed to recover."

Referring to *DeKam* v. *City of Streator*, 316 Ill. 123, the Court says,

> "The court also held that everyone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated for."

The pretended contract in this case arose from conversations between the president of Alsip, Mr. John Benck and Rado (App. 15-20) and no ordinance or resolution shows any contract with taxpayers. The above case places a lack of a contract passed by the board with a supporting yea and nay vote on the same plane as the absence of an appropriation for contracts payable from the general fund and holds them both void.

In *Selby* v. *Village of Winfield*, 255 Ill. App. 67, 77, the president of the Village of Winfield, executed a contract with plaintiff for engineering services, but the board refused to ratify it. The Court holds that since there was no ordinance or resolution supported by a yea and nay vote there was no liability. pp. 73-75. The Court further says:

> "A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it. The prohibition of the legislature cannot be disregarded by the Courts." (citing 6 Illinois cases). * * * (p. 77) "Everyone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts, simply because it has done them and received the consideration stipulated for."

In *Izzo et al* v. *City of Loves Park,* 20 Ill. App. 117, 127 the plaintiff alleged the entering into a contract with the City, and upheld the dismissal of Count IV on the ground no payment from a special fund was alleged and no appropriation was alleged, holding further:

> "A city cannot be estopped to dispute the validity of a contract which it had no power to make on the ground that work had been done under the contract and the city had received the benefit of such work. *Arnold* v. *Village of Ina,* 244 Ill. App. 239. *DeKam* v. *City of Streator,* supra 2.

Where obligations against a municipality are sought without compliance with the statute requiring appropriation (where general funds are involved, as here) or where there is no ordinance or resolution supported by a yea and nay vote, such contracts are prohibited by statute and are void. No estoppel applies in such cases from receiving benefits. The above Illinois cases do not support the holding of the Court of Appeals in par. 1, p. 8 that Alsip is estopped.

Such cases are distinguishable from such as *McGovern* v. *City of Chicago,* 281 Ill. 264, where there is a contract but a mere irregularity in its execution.

D. No contract between Alsip and the taxpayers is established by the discovery depositions taken in this case.

Rule 26 (d) of the Rules of Civil Procedure provides as follows:

> "At the trial or upon the hearing of a motion or an interlocutory proceeding any part or all of a deposition SO FAR AS ADMISSIBLE UNDER THE RULES OF EVIDENCE, may be used against any party who was present or represented at the taking of the deposition", etc. (emphasis mine)

Although the discovery deposition of defendant Rado can be used because he is a party, nothing in his deposition can be used unless it conforms to the requirement of the above Rule 26 (d), and would be admissible on trial, namely, evidence that is relevant, competent and material.

The only thing in this record other than the answer which bears on whether or not the Village is indebted to taxpayers is defendant Rado's testimony on pages 63-91, and 107 and 108 (Appendix 17-20, App. 21-22). In the United States Code Annotated, Title 28, Federal Rules of Civil Procedure, Rule 26, Note 9, the author states:

> "The rules sharply distinguish between the right to take the deposition and the right to use it at the trial. There is no restriction whatever on the right to take and it may, therefore, be said that unlimited discovery is contemplated. But there are very definite restrictions on the right to use the depositions. Unlimited proof by deposition is, therefore, not contemplated." 15 Tenn. L. Rev. 737.

The author further states:

> "In weighing this problem (of depositions and discovery) the Committee on Rules For Civil Procedure found the ideal solution: The right to take statements and the right to use them in court have

been kept entirely distinct. There was effected a very able merger of the two devices—a merger which afforded the advantages present in both the most liberal discovery procedure and the most liberal deposition procedure. The utmost freedom is allowed in taking depositions; restrictions are imposed upon their use. As a result, there is accorded the widest possible opportunity for knowledge by both the parties of all the facts before the trial. Such of this testimony as may be appropriate for use as a substitute for viva voce examination may be introduced at the trial; the remainder of the testimony, having served its purpose in revealing the facts to the parties before trial, drops out of the judicial picture. This is the central notion of the deposition-discovery practice provided by the new federal rules of civil procedure." 38 Colum. L. Rev. 1179.

With this distinction in mind the courts have repeatedly held that a refusal to answer questions on the taking of a deposition may not be excused on grounds that the answers might be inadmissible at trial, but questions should be answered if they appear to be reasonably calculated to lead to the discovery of admissible evidence. See *Lowe's of Roanoke, Inc.* v. *Jefferson Standard Life Ins.* Co., D.C.N.Y. 1963, 219 F. Supp. 181. Adverting to the wording of Rule 26 (d) we find that at the trial or upon the hearing of a motion any part or all of a deposition may be used only SO FAR AS ADMISSIBLE UNDER THE RULES OF EVIDENCE.

The testimony of Mr. Rado above referred to would not be admissible by any court to establish a contract between Alsip and the taxpayers. In the first place, it is purely self-serving. There is much hearsay. He is an interested party. It is not the best evidence. It is not evidence that is admissible under any rules of evidence.

The conclusion is inescapable that no contract between Alsip and the taxpayers is established by the discovery depositions of defendant Rado or anyone else in this record.

E. Although the answer to paragraph 9 of the complaint purports to admit that Alsip agreed to purchase said water system from the taxpayers, such is inconsistent with other portions of the answer denying liability and the answer should be withdrawn so that it can be corrected.

The answer in fact should be withdrawn and a motion made alleging a failure to state a claim of action in which relief can be granted because the complaint does not show that the payment for the water system construction was not to be paid for out of a special fund as in the *Branigar* case, 396 Ill. 534, 542, and no appropriation was shown therefor (App. 32-33; appellee's app. 2, 29). Since the payment was to come out of general funds and no appropriation was made therefor, the Village clearly had no power to enter into or ratify a contract therefor, under the *DeKam, Simpson* and *Branigar* cases. This defense was not raised below but would have been a conclusive denial of liability if it had been raised under the above Illinois cases. Justice to the Alsip taxpayers requires a proper set of pleadings in this case. *Izzo* v. *City of Loves Park,* 20 Ill. App. 117, 126.

F. There is no debt here from Alsip to taxpayers upon which the taxpayers (or the plaintiff standing in the taxpayers shoes) can recover.

See the cases of *People* v. *Chicago Transit Authority,* 392 Ill. 77, 93; *Hairgrove* v. *City of Jacksonville,* 366 Ill. 163, 177-A; and *Simpson* v. *Village of Highwood,* 372 Ill. 212, 222-3.

G. The Government is estopped to deny Alsip's contract was with Santry.

It is clear that the government relies on the resolution of February 20, 1960. By this resolution it is directly stated that the contract of the Village was with Santry and that it had directed Santry to contract with the taxpayers. Furthermore, payment of Santry's balance was made directly to him by Alsip and not by taxpayers and not by Alsip to taxpayers to be paid to him. Defendant Alsip contends that this direct reference to a contract with Santry and direct dealing with him show that the contract was with Santry and that the Government's evidence establishes it. Such estops the government.

H. There was no ratification of a contract between Alsip and taxpayers.

The question seems to boil down to whether or not defendant Alsip ratified the obligation to pay money to the taxpayers. In Point Two on page 15 of its brief in the Circuit Court of Appeals, the government uses this language,

> "• • • the municipality's obligations arise only upon its subsequent ratification of these agreements, since the officials lack power to create a liability against the municipality. It is the municipality's ratification that binds it to a contract and constitutes its offer or acceptance."

Later on in the same page the Government uses this language,

> "In the instant case the agreement to purchase the taxpayers constructed water system was ratified by the Village on a number of occasions: By the resolution of October 6, 1955, proposing the bond issue to finance the purchase; by the approval on September 20, 1958 of the bond issue; by the issuance of the

bonds on December 1, 1958; by the resolution of February 20, 1960 authorizing the disbursement of a portion of the purchase price to Santry; and by the actual disbursement of this sum to Santry sometime during that month. All of these acts of ratification were within the power of the Village and its Board of Trustees and were authorized by majority vote of the trustees."

In the first place, there can be no ratification of a contract to purchase the water system from taxpayers, where there is no contract. There is no contract here between Alsip or any of its officials and the taxpayers. Hence, there can be no ratification.

Secondly, the resolution of February 20, 1960, introduced and made a part of the Sterba discovery deposition by the Government, specifically recites that the contract for the construction of the water works was with Santry (App. 28-29), and such not only rules out any contract with the taxpayers, but the Government is bound by its own evidence.

Thirdly, the motion or resolution of October 6, 1955, relating to a bond issue to finance the purchase of the water main extension (App. 13, 25) does not ratify an agreement to pay the taxpayers because said resolution was passed prior to the date of the execution of the contract between Santry and the taxpayers and there is no evidence therein that any payment was to be made to taxpayers.

The finding on page 7 of the opinion that the accounting records show a provision for payment of an additional payment of $10,000 to taxpayers from the water fund is erroneous. No such payment was authorized or promised nor is there any evidence of it in the record in

said reports. (App. 32-38) These records are hearsay and are not admissions of defendant Alsip under Rule 26 (d).

The passage of the ordinance of September 20, 1958 authorizing water improvement bonds for $175,000 and waterworks bonds for $50,000 does not recite that the funds were to be paid to the taxpayers, nor does the fact of issuance of them on December 1, 1958 show such proof.

The fact of the remuneration of the taxpayers in the resolution of February 20, 1960 for the $28,600 they had paid Santry is offset by the fact that in the same resolution provision was made to pay Santry the balance due him in the sum of $31,044.58. The resolution also states the contract was with Santry. (App. 30-31)

The acts other than the resolution of February 20, 1960 relied upon by the government to show ratifications are equivocal and do not show who the contract was with or to whom the money was to be paid. The resolution of February 20, 1960, on the other hand, points to Santry rather than to the taxpayers as the contracting party.

Alsip contends that the government's contention of a ratification by Alsip of a contract with taxpayers is not proved.

Under the holding in *Town of Waveland* v. *Odell & Johnson,* 329 Pacific 2d 797, 801, the taxpayers had a subdivision to market and their entry into a contract with Santry was for the purpose of rendering their subdivision marketable; the effort to put the liability on Alsip is but an afterthought. Hence, in paying the $28,600.00 they were merely paying to make their property more marketable; the repayment by Alsip was a wind-

fall they were not entitled to. Alsip just bent over backwards to take them out of a spot they were in. But note: Alsip gave them no money—merely credited them for monies they owed Alsip.

I. There is no liability in assumpsit against Alsip in this case.

On page 8 of its opinion the Circuit Court of Appeals states that Alsip is liable to the taxpayers in assumpsit because it had money from bond issues to be used in paying for the purchase price of the constructed water system. This is contrary to Illinois cases.

The error in this reasoning, Alsip contends, is the assumption that Alsip owed the taxpayers for the said construction. There is no proof of said debt.

The money raised from the bond issue certainly never was the money of the taxpayers, which got into the hands of Alsip.

How can the Circuit Court of Appeals properly hold that Alsip had money in its hands which in equity and good conscience it owed to the taxpayers when Alsip had paid the party who furnished the materials and did the work, on the refusal of the taxpayers to do so? Where is the equity and good conscience in telling Santry, "You did the work and furnished the materials prior to the time the government filed with us any notice of a claim for a tax lien on the taxpayers' funds; we have the money to pay. The taxpayers cannot pay the government and you too. Sorry, Santry, you can whistle for your money!"?

If taxpayers had any claim on the funds, it was because they were contractors, which Alsip denies. If the taxpayers were contractors then Santry was a subcon-

tractor and he had a lien not only under Sec. 23, Ch. 82 referred to in point II, but also because his lien rights were prior in time to that of the government or taxpayers. The usual rule is that equities prior in time prevail.

As will be pointed out in II, E, there was no waiver under the Illinois cases referred to in paragraph 7 of the complaint. (App. 5)

J. A party suing on a contract and alleging performance of it can only recover by proving performance in strict accordance with its terms. No such allegations appear here.

There is no contract here and there can be no allegation of strict performance with its terms. Taxpayers did not pay Santry the $31,044.58 he had coming and they cannot complain that the Village paid him. Taxpayers did not perform and could not sue.

See the cases of *Turner* v. *Osgood Art Color Type Co.*, 223 Ill. 629, 637; *Archibald* v. *Board of Education*, 19 Ill. App. 2d 554, 561-2; *Atlantic Refining Co.* v. *Continental Casualty Co.*, D.C.W.D. Pa. 1960, 183 F. Supp. 478, 481; *Abeles and Taussig L. and T. Co.* v. *Northwest Side Lumber Co.*, 239 Ill. App. 623, 624-5.

K. The Plaintiff cannot, by involuntary proceedings, take monies claimed by the taxpayers to be due from the defendant Alsip if the defendant taxpayers could not assign or transfer them voluntarily. The plaintiff stands in the shoes of taxpayers and has no greater rights than they have against the defendant Alsip.

The federal courts repeatedly have held that the government can take no more than the debtor whose property is being sought in the proceedings.

a. The federal courts repeatedly have held that the government can take no more than the debtor whose property is being sought in the proceedings. See the following cases: *Karno-Smith Co.* v. *Malone, Collector,* CCA 3, 1940, 112 Federal 2d 690, 692. *United States* v. *Winette,* 165 Federal Second 149, 151, CCA 9, 1947. *United States* v. *Bank of the United States,* 5 Federal Supplement, 942, 944-5, D.C. S.D. N.Y. 1934. *U. S.* v. *Western Union Telegraph Co.,* 50 Federal Second 102, 103, CCA 2, 1931. *United States* v. *Graham,* 96 Federal Supplement, 318, 321. *Central Surety and Insurance Corp.* v. *Martin Infante Co.,* CCA 3, 1959, 272 Federal Second 231, 234-5.

b. Section 3670 (now 6321 I.R.C. 1954) creates no property rights; it merely attaches consequences, federally defined, to rights created under state law.

In *United States* v. *Bess,* 357 U.S. 51, 55, the Court says:

> "Since Section 3670 creates no property rights, but merely attaches consequences, federally defined, to rights created under state law, *Fidelity and Deposit Co.* v. *New York City Housing Authority,* 241 Federal Second 142, 144, we must look first to Mr. Bess' right in the policies as defined by state law."

This holding was later affirmed in the later case of *Aquilino* v. *United States,* 363 U.S. 509, 512-514.

In the brief filed in the Circuit Court of Appeals the government made the point that by virtue of its liens arising under Section 6321 of the Internal Revenue Code of 1954, it had rights in a taxpayer's property to which its liens attached, superior to the rights of the taxpayer's general creditors. Defendant Alsip contends that this contention on the part of the government is disposed of adversely to it by the above two cases.

c. The Illinois Garnishment Act merely subrogates the judgment creditor to the rights of the judgment debtor against the garnishee.

In 20 Illinois Law and Practice entitled, "Garnishment", the author says,

> "The effect of garnishment is simply to subrogate the plaintiff or judgment creditor to whatever rights the judgment debtor may have against the garnishee, or, as otherwise stated, a creditor stands in exactly the same attitude in relation to the garnished property that the judgment debtor does."

The court held in *Zeimek* v. *Illinois National Casualty Co.*, 370 Ill. 572, 576:

> "This court has recognized the general rule that the indebtedness sought to be garnished must be a liquidated sum due without contingency at the dates when the answer to the garnishment suit was filed.
>
> "Usually it must be a claim on which the debtor, himself, could have maintained an action against the garnishee. (Shin on Attachment and Garnishment, Secs. 475-483; 28 Corpus Juris, p. 44)."

Under these holdings the government cannot recover against defendant Alsip because the taxpayers could not recover against it. These Illinois cases show that since taxpayers had no property in the hands of Alsip there was none belonging to the government under its lien.

The following Federal cases hold in favor of Alsip in this matter, viz: *Randall* v. *Colby,* 190 F. Supp. 319, 334 (D. C. Iowa, 1961)

> "Under the Federal law, in order for a Federal tax lien to attach to any portion of the balance on the contract, there must have been at some time a right on the part of the contractor to demand and receive such portion."

Atlantic Refining Co. v. *Continental Casualty Co.*, 183 F. Supp. 478, 482 (D. C. Pa., 1960)

> "As of the dates the Federal liens were assessed (1955), the contractor was not entitled to receive any money under the terms of the contract, for the contractor owed material men on both jobs. On the * * * (first) job the unpaid amount was practically equivalent to the amount withheld by the owner, and on the * * * (second) job the amount was substantially in excess of the amount withheld."

See also: *Van Etten* v. *New York State Natural Gas Corporation*, 192 F. Supp. 832, 837 (D.C. Pa. 1961). *Davis & Warshaw, Inc.* v. *S. Iser, Inc.*, 220 N.Y.S. 2d 818 (N.Y. Sup. Ct. 1961)

L. There was no waiver by Alsip of these points brought forward in this petition as the Circuit Court of Appeals held on page 7 of its opinion.

There was no trial in this case. The matter was decided on a motion for summary judgment. When this matter came before the District Court, the attorney for the Village of Alsip wanted to have oral arguments so that he could bring out the points herein raised.

The Court refused to allow him to proceed. In fact, Mr. Gentile asked the court twice for the purpose of arguing the matter orally, and the Court, in both instances, turned him down. (App. 42-43; 44)

The District Judge appeared to think that there had been a pay-off by the Village Board. (App. 43)

At the second time of the request for oral argument, the Court stated there was no purpose; that the Village did not have a leg to stand on in that Court or in the Court of Appeals. (App. 44)

Defendant Alsip contends that neither the Circuit Court of Appeals nor the District Attorney nor the attorneys for the Government, under these circumstances properly can say that defendant Alsip waived these points and did not bring them up. The attorney for the Village of Alsip was prevented from bringing them up by the Court, as the Court felt it knew the answer without going into the facts.

It is suggested that this conduct on the part of the District Judge hardly meets the test for a proper judicial examination of issues pending before him. At least Alsip should not be held to have waived the points by not raising them.

In conclusion to this first part of the petition, defendant Alsip calls attention to the Court that under Illinois cases (which control), no money or other tangible property belonging to the taxpayers or to the government was in its hands, when the liens were filed or later. Further, no indebtedness from Alsip to the taxpayers or to the government is shown and there is no basis for liability to the government, which stands in the shoes of the taxpayers.

Alsip contends that this should show reversible error and terminate the case.

II.

IF FOR PURPOSES OF ARGUMENT WE ADOPT THE THEORY PROPOUNDED BY PLAINTIFF THAT A CONTRACTUAL RELATIONSHIP WAS ESTABLISHED BETWEEN DEFENDANT ALSIP AND THE TAXPAYERS BY RATIFICATION OR OTHERWISE, THE PLAINTIFF HEREIN COULD NOT RECOVER THE $31,044.58 PAID TO SANTRY AND INTEREST THEREON BECAUSE DEFENDANT ALSIP WAS ENTITLED TO CREDIT FOR SUCH PAYMENT AND DOES NOT HAVE TO PAY IT TWICE.

A. By the provisions of the first paragraph of Section 23, Ch. 82, Smith-Hurd's Ann. Sta., if the taxpayers were the contractors (as plaintiff contends herein), then Santry was a subcontractor who had a lien for labor and material for the job specified in the contract for labor and materials furnished by him.

This lien was on money coming to taxpayers if such money was coming to them. Santry's claim was not against Alsip but against taxpayers, under this theory.

The first paragraph of Section 23 of Ch. 82, Ill. Rev. Statutes, which was in effect during all the times relevant in these proceedings, provided as follows:

> "For the purpose of this section 'contractor' includes any subcontractor. Any person who shall furnish material, apparatus, fixtures, machinery, or labor to any contractor having a contract for public improvement for any county, township, school district, city or municipality in this State, shall have a lien on the money, bonds, or warrants due or to become due the contractor having a contract with such county, township, school district or municipality in this State under such contract: Provided, such person shall, before payment or delivery thereof is made to such contractor, notify the official or officials of the county, township, school district, city or municipality whose duty it is to pay such contractor

his claim by a written notice and furnish a copy of said notice at once to said contractor, And, provided further, that such lien shall attach only to that portion of such money, bonds or warrants against which no voucher or other evidence of indebtedness has been issued and delivered to the contractor by or on behalf of the county, township, school district, city or municipality as the case may be at the time of such notice. The person so claiming a lien shall, within sixty (60) days after filing such notice, commence proceedings by complaint for an accounting, making the contractor having a contract with the county, township, school district, city or municipality and the contractor to whom such material, apparatus, fixtures, machinery or labor was furnished, parties defendant, and shall within the same period notify the official or officials of the county, township, school district, city or municipality of the commencement of said suit by delivering to him or them a certified copy of the complaint filed. It shall be the duty of any such official upon receipt of the first notice herein provided for to withhold a sufficient amount to pay such claim for the period limited for the filing of suit, unless otherwise notified by the person claiming the lien. Upon the expiration of this period the money, bonds or warrants so withheld shall be released for payment to the contractor unless the person claiming the lien shall have instituted proceedings and served the official of the county, township, school district, city or municipality with the certified copy of the complaint as herein provided, in which case, the amount claimed shall be withheld until the final adjudication of the suit is had; provided that the official so notified may pay over to the clerk of the court in which such suit is pending a sum sufficient to pay claimed to abide the result of such suit and be distributed by the clerk according to the decree rendered. Any payment so made to such claimant or to the clerk of the court

shall be a credit on the contract price to be paid to such contractor."

The Supreme Court of Illinois in the cases of *Alexander Lumber Co.* v. *Coberg*, 356 Ill. 49, 54; and *Alexander Lumber Co.* v. *City of Farmer City*, 272 Ill. 264-275, hold that other sections of the Lien Act having to do with the enforcement of liens do not apply to a lien created by the first paragraph of Section 23.

Three things were necessary to the perfection of the lien for the $31,044.58 by Santry and he did them, viz:

1. He furnished material and labor to a contractor on a public improvement, assuming that the taxpayers were a contractor, for the purposes of argument.

2. He notified the proper official of the municipality prior to the time the money, bonds or warrants were paid to the contractor, assuming that the taxpayers were the contractor.

3. He commenced suit for an accounting within 60 days—19—to be precise.

In the case of a public improvement, the subcontractor need only prove the furnishing of material, apparatus, machinery or labor to one who is contractor for the public improvement. He need not prove he has a contract with the original contractor; the mere furnishing of the labor or material is sufficient.

See *Spalding Lumber Co.* v. *Brown*, 171 Ill. 487-492. *County of Coles* v. *Haynes and Lyons*, 134 Ill. App. 320, affirmed in 234 Ill. 137. *Pratt's Sons Co.* v. *Schafer*, 290 Ill. App. 80, 86-7. *Granite City Lime and Cement Co.* v. *Board of Education of School District No. 126*, 203 Ill. App. 134, 140.

After the subcontractor has furnished labor and materials on a public improvement, he is only required to serve a notice in writing on the proper official before the money is paid or the bonds or warrants are delivered to the contractor, and the lien of the subcontractor becomes perfected as to all funds not paid over or bonds or warrants not delivered upon service of notice on the official. See *Spalding Lumber Co.* v. *Brown*, 171 Ill. 487, 492-3.

There is no dispute that the material and labor were furnished by Santry Engineering Co. The notice Santry Construction Co. served claiming its lien for $31,044.58 for labor and material furnished is found on page 17 of the Appendix and is exhibit E to Government's exhibit No. 2 in the Rado deposition.

The complaint filed by the Santry Construction Co. appears Appendix 45-50.

The filing stamp of the Clerk of the Circuit Court of Cook County for case No. 58 C 15338 shows that it was filed October 28, 1958.

The notice for the claim of the lien having been dated October 9, 1958, it was served after said date and there is no contention that Santry did not begin his suit within the 60 day period. He, therefore, had a lien for any money he had coming if the taxpayers were contractors with defendant Alsip.

B. If an original contractor assigns voluntarily to a third person a portion of the monies due him from the municipality for a municipal improvement, and subsequently a subcontractor establishes a lien against the money due the contractor from the municipality by serving notice of his claim prior to the payment of the money by the municipality, the subcontractor's lien thus established takes precedence over the rights of the assignee. It is part of the public policy of Illinois that subcontractors not be beaten out of funds due to them.

In *Spalding Lumber Co.* v. *Brown*, 171 Ill. 487, 413, Brown entered into a contract with the Kickapoo School District to build a school house. He failed to complete and the district finished the building. Brown gave Spalding and Myers orders which they insisted took precedence over others. Total claims were $3,095.96 and the district paid in the balance of $1,189.13, which the court divided pro rata. Spalding appealed. The Court held:

> "Under the above section of the statute a lien is conferred upon the person who may furnish material etc. to any contractor. In order to avail of, the lien conferred, the sub-contractor is only required to serve a notice in writing on the official before the money is paid or before the bonds or warrants are delivered to the contractor. * * *
>
> "Under section 24 of the Lien law it is plain that the lien is created by the performance of the labor of the furnishing of the materials, and the lien of the sub-contractor become perfect as to all funds not paid over or bonds or warrants not delivered, upon service of notice on the officials. The statute makes no provision for the giving of orders by the contractor which may operate as an assignment of any part of the fund agreed to be paid for the construction of the building, nor is there any provision of the statute authorizing the school board to accept such orders, and we see no ground upon which it

can be held that an assignment of the fund, by order or otherwise, can defeat the lien created by statute.

(Par. mine) "It is not pretended that the claim of the contractor was negotiable or that appellants are entitled to protection as purchasers of a negotiable instrument. The claim is, that the orders are to be regarded as an equitable assignment of the money due or to become due from the school board to the contractor. Treating the orders as an equitable assignment, they would not defeat the lien of the sub-contractors. The law is well settled that an assignee takes a non-negotiable instrument subject to all infirmities which exist against it in the hands of the assignor, except latent equities of third persons. (Cit. auth.) The claim of the contractor against the school board when he executed the orders, was a mere choice in action, and appellants took the assignment of the claim subject to all equities existing in favor of those who had liens under the statute. The appellants, as assignees of the contractor, stand in his shoes, and they occupy no better position than he would have occupied if he had retained the claim in his own hands. There is only one way of obtaining a lien upon the fund, and that is by serving the notice on the officers required by statute. When the notice is served the officers are compelled to retain in their hands a sufficient amount to pay the liens, and should there not be enough to pay the claimants in full, then those serving notice are entitled to share in the fund *pro rata*. If, however, a contractor could defeat the lien of a sub-contractor, by merely transferring the fund due or to become due, by giving an order, the statute creating a lien in favor of a person furnishing labor or material to a contractor for a public improvement would become a nullity, as the fund might be transferred immediately upon making the contract to erect the building."

This ruling was followed in the case of *Haynes and Lyons* v. *County of Coles,* 234 Ill. 137, 144. That was a case

where in a former suit the contractor had brought suit in asumpsit on behalf of the holders of orders sold to pay for the job of rebuilding the courthouse. In the second suit subcontractors holding some $12,000.00 of lien claims gave notice under Section 24, now Section 23, and the holders of the orders in the former suit intervened and opposed relief. The lower court granted relief. The court held,

> "The *Spalding Lumber* case is decisive of the question raised by the interveners in this case."

The government stands in the shoes of the parties claiming precedence in the *Brown* suit. Since the contractors could not give preferential treatment to subcontractors in the *Brown* case, neither could the taxpayers in this case give preferential treatment to the government had they voluntarily attempted to do so. As the court points out, if such could be done, the statute would become a nullity, as the fund might be transferred immediately upon making the contract to erect the building.

It is a matter of public policy in the State of Illinois to prevent this being done.

C. Any municipal official disregarding the rights of the subcontractor who had served notice and perfected his lien is liable to suit by the subcontractor, who may sue also for the protection of his lien rights in addition to this remedy. Also he would be liable to criminal prosecution under Illinois statutes.

a. In the fifth paragraph of Section 23 of Chapter 82, there is a provision made for civil liability against any officer of the state, county, township, school district, city or municipality violating the duty hereby imposed upon him.

b. Section 449 of Chapter 38, Smith-Hurd's Annotated Statutes (Sec. 208, Div. 1 of the Illinois Criminal Code) provides for a fine not exceeding $10,000.00 against any person holding municipal employment who shall be guilty of any palpable omission of duty or who shall be guilty of diverting any public money from the uses or purposes for which it may have been appropriated or set aside under the authority of the law.

This section was quoted in *DeKam* v. *Streator*, 316 Ill. 123, 129; and in *Fergus* v. *Brady*, 277 Ill. 272, 277, 279.

After Mr. Santry had filed his notice of lien the payment by any city official or the Village Board would have subjected them to personal liability and also to criminal liability, defendant Alsip contends.

In the face of the law suit filed by Santry against defendant Alsip the Village could have done nothing other than make the payment, under the circumstances of this case. They should be protected after having made such payment after said suit was filed against them.

D. If a debtor-creditor relationship existed between the taxpayers and defendant Alsip, the provision in the contract between Santry and the taxpayers referred to in paragraph 7 of the complaint was not a waiver by Santry of his right to file his lien against the money owed by defendant Alsip to the taxpayers.

A. Santry collected property of taxpayers—not that of defendant Alsip.

In the complaint, paragraph 8, the government alleges:

> "8. The contract referred to in paragraph 7 provided in part: 'It is understood the contractor (Santry Construction Co.) is to look to the Homecraft Construction Co., 2136 W. 51st St., Chicago 9, Illinois,

herein called the owner, for payment of said work, and that the Village of Alsip is not to be liable in any manner for payment of said construction'."

If there was no debt owed by the defendant Alsip to the taxpayers, as defendant contends, this point is not relevant. However, if such relation is found to exist, then defendant Alsip contends that the above referred to provision (App. 16; Rec. 39) was an agreement to look to the taxpayers and not to the defendant Alsip.

Defendant Alsip contends that the above section of the contract does not prevent Santry from receiving payment from the defendant Alsip for the reason that in receiving such payment he was merely receiving money which the government claims belonged to the taxpayers. Although the mechanics were to file notice upon a village official and to file suit against the taxpayers and defendant Alsip, the suit was, in fact, one for taking money from the contractors and not for imposing a judgment against the defendant Alsip.

The Illinois courts repeatedly have held that paragraph 1 of Section 23 does not prejudice or infringe upon the rights of the municipality involved, but that the person affected is the contractor who owes the money to those furnishing materials, labor and so forth. See the cases of *Standard Oil Co.* v. *Vanderboom,* 326 Ill. 418, 424; and *Gunther* v. *O'Brien Bros. Construction Co.,* 369 Ill. 362, 369. Hence, the taking of the money by Santry was not taking money from defendant Alsip but from taxpayers and is no violation of his agreement aforesaid.

The municipality owes the money to somebody when public improvements are made by subcontractor and whether the money is paid to the contractor or to the subcontractor is of no consequence to the Village. See *People* v. *Village*

of Bradley, 367 Ill. 301, 304. And the further case of *Consolidated Construction Co.* v. *Malan Construction Co.,* 42 Ill. App. Second, 272, 277.

The lien of the subcontractor is on the money and so forth, coming to the contractor, and not against the property of the municipality. See the case of *McMillan* v. *Casey Co.,* 311 Ill. 584, 587.

b. The usual form of lien waiver used in Illinois was not used here.

In Illinois the usual form of lien waiver is that the completed work "shall be delivered free from any and all liens, claims or encumbrances of any description whatever." See *Cameron-Schroth* v. *Geseke,* 251 Ill. 402, 404; *Brown Const. Co.* v. *Central Illinois Const. Co.,* 234 Ill. 397, 403; *Depuis* v. *Snook,* 186 Ill. App. 330, 333-334; *Elgin, Joliet & Eastern Ry. Co.* v. *Northwestern Bank of Chicago,* 165 Ill. App. 35, 43.

c. The usual clause in private contracts that the work on a job "shall be free from liens" is ineffective to waive the lien of the subcontractor or municipal jobs.

Due to the different kind of lien provided the subcontractor in a public improvement, it was held in *Central Lime & Cement Co.* v. *Leyden-Ortseifen Co.,* 245 Ill. App. 48, 53 that provisions in contracts for municipal work that it shall be done "free from liens" is ineffectual due to the nature of the right given.

In *Burgoyne* v. *Pyle,* 261 Ill. App. 356, 369, it was held that in case of ambiguity, the doubt should be resolved against the contention that the lien is waived, since it should be presumed, in the evidence of clear evidence to the contrary, that the contractor has not surrendered the valuable right of a mechanic's lien.

It is contended that the ambiguity of the language is such that the plaintiff's contention in the lower court that Santry has waived his right to a lien is untenable and must be rejected.

d. An agreement to relinquish a lien claim when certain conditions or terms have been complied with will not impair the lien, nor amount to a waiver of the same if those conditions or terms are broken or not perfected. In *Stolze Lumber Co.* v. *Oglesby,* 266 Ill. App. 569, 573, the Court held that an agreement by one who has a lien to relinquish the same when certain conditions or terms are fulfilled will not amount to a waiver of the same if the conditions or terms are broken or are not performed. (citing authority)

Likewise, in *United States Gypsum Co.* v. *Randall,* 300 Ill. App. 610, 21 N.E. 2d 327, the court holds that a corporation which furnished labor and material for construction of hospital was entitled to a mechanic's lien, notwithstanding that written waiver of lien and agreement not to enforce claim for lien was executed in consideration for promises which were not performed.

The contract between Santry and the taxpayers provided:

> "Owner agrees to pay contractor the contract price periodically on the basis of estimates made by the engineer and issued to the contractor each month, which shall be for 90% of the work done in the period and payment shall be made within 5 days of the time the owner is notified of said estimate."

It would appear obvious from the above authorities that since Santry did the work and furnished the material for installing a water system in the taxpayers subdivision, within defendant Alsip, that the equitable thing to be done was for defendant Alsip to pay him when taxpayers failed

and refused to do so. The public policy of the State of Illinois as declared by the above statutes and decisions show that there is no waiver of the rights of a party who has furnished labor or material on public improvements when he is not paid after having done the work even though the alleged waiver is full and complete.

III.

NO CONDITIONS ARE PRESENT TO WARRANT THE AWARD OF INTEREST TO THE GOVERNMENT ON ITS CLAIM.

A. There was no interest at common law.

See the cases of *City of Pekin* v. *Reynolds*, 31 Ill. 529, 532; *Smith* v. *County of Logan*, 284 Ill. 163; *Morgan* v. *City of Rockford*, 375 Ill. 326, 328.

B. Illinois decisions hold that a municipality is liable for interest in three types of cases:

1. **Where there is an express agreement to pay it;**
2. **Where money has been obtained wrongfully by it;**
3. **Where money is illegally withheld by the municipality.**

See the cases of *City of Chicago* v. *Conway*, 138 Ill. App. 320, 337; and *Barber Asphalt Paving Co.* v. *City of Chicago*, 139 Ill. App. 121, 133.

If a municipality has wrongfully diverted funds, then interest is payable by it. See *Conway* v. *City of Chicago*, 237 Ill. 128, 136; *Board of Trustees of Police Pension Fund of Glen Ellyn* v. *Village of Glen Ellyn*, 337 Ill. App. 183, 198-199, 84 N.E. 2d 473.

By the terms of the federal statute under which the Government proceeds, no interest is payable unless defend-

ant Alsip diverted money or property to which the Government was entitled.

The $31,044.58 paid by defendant Alsip to Santry after the alleged lien of the Government attached is not a payment under any of the above type of cases. In the first place, as pointed out above, taxpayers had no contract with defendant Alsip; secondly, if there was a contractual relationship, the money was paid under Section 23 of Chapter 82, being the Lien Act of Illinois, and it was entitled to receive credit for such payment. Defendant Alsip contends that none of the elements necessary to charge it with interest is present.

IV.

RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE PROVIDES THAT NO SUMMARY JUDGMENT SHOULD BE GRANTED UNLESS IT IS SHOWN THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW. IT IS SUBMITTED THAT THE FOLLOWING, AMONG OTHER FACTS, SHOW THAT THERE ARE FACTUAL ISSUES WHICH DEPRIVE THE PLAINTIFF OF THE RIGHT TO SUMMARY JUDGMENT AND THAT SHOW THAT THE DEFENDANT WAS ENTITLED TO A JUDGMENT OF NON-LIABILITY AS A MATTER OF LAW.

1. The record shows that no yea and nay vote was taken or any ordinance or resolution whatever provided for a contract between defendant Alsip and the taxpayers.

Actually no contract at all between any member of the Village administration and taxpayers was alleged or proved. Is not a factual issue involved in whether such self-serving statements amount to a contract, in that the ordinary elements showing the terms of any agreement

are wholly missing? The Circuit Court of Appeals refused to decide this issue although the Supreme Court of Illinois repeatedly has held that the same wording under a prior statute refers to villages as well as to cities. This position is fortified by the admission of the Government that it does not rely on "agreements, written or unwritten by the taxpayers and the Village officials to establish the Village's obligation to the taxpayers. The municipality's obligation arises only upon its subsequnet ratification of these argeements since the officials lack power to create a liability against the municipality."

2. There is decidedly a factual question as to whether defendant Alsip ratified any contract to pay taxpayers for this work improperly alleged to have been made by individuals in the Village administration. There could be not ratification of a contract unless there first was a contract to be ratified.

3. In the brief in the Circuit Court of Appeals the Government states: "It is the municipality's ratification that binds it to a contract and constitutes its offer or acceptance."

Alsip contends that the contention of the Government that the matters related on page 6 of the Opinion of the Circuit Court of Appeals amounted to ratification, do not show those factual acts which constitute ratification; further, contends that the resolution of February 20, 1960 definitely shows that there was no ratification of any agreement to pay taxpayers the $31,044.58; it further contends that the acts referred to on page 6 of the opinion of the Circuit Court of Appeals are equivocal.

The acts set forth on page 6 of the Opinion do not point to an agreement to pay taxpayers any more than they point to an agreement to pay Santry; they merely

show that the Village wanted to pay the party entitled thereto.

4. The resolution of February 20, 1960 introduced into evidence by the Government in which the Village stated it had a contract with Santry raises a factual question as to whether the contract was with Santry which overcomes any alleged findings as a matter of law that it had one with the taxpayers.

5. Defendant Alsip contends that there is a factual question as to whether or not the taxpayers showed their right to recovery had they sued the Village.

Defendant Alsip contends that taxpayers could not have recovered had they brought such a suit, and that the Government stands in their shoes. No facts appear showing that the taxpayers fulfilled the conditions necessary for them to invoke the rule of waiver above referred to.

6. Defendant Alsip contends there is a factual question as to whether there was any property in its hands belonging to taxpayers or the Government standing in their shoes, and if there is no factual question, it is because the evidence points to the fact that the Defendant had no such property in its hands under Illinois law.

7. Defendant contends that it is a factual question as to whether defendant Alsip waived the right to raise certain points set forth in its brief and whether it failed to challenge its own actions and resolutions in the District Court when the presiding judge twice refused the right to hear argument on the propriety of the summary judgment sought.

Summary judgments should be granted only when the defendant has no defenses. That is not the situation in this case. Defendant Alsip has adequate defenses if the rules of law are followed. Rule 56, F. Rules of C. Proc.

8. The question of whether there are factual defenses here depends on whether or not proper proof supports the summary judgment. For reasons above stated, defendant Alsip contends that improper proof was considered by the trial court which could not have been received in a trial of the issues of the case.

For the above reasons defendant Alsip contends that the summary judgment is shown by the record to have been improperly granted because of the pendency of factual issues.

V.

THE ADJUDICATIONS OF THE FEDERAL AND STATE COURTS IN SIMILAR CASES DENY RECOVERY TO THE GOVERNMENT IN THIS CASE.

One of the leading cases is *U.S.* v. *Durham*, 257 Federal 2d, 570, 574. This was a Circuit Court of Appeals decision which was examined by the United States Supreme Court in *U.S.* v. *Durham Lumber Co.*, 363 U.S. 522.

In *Atlantic Refining* v. *Continential Casualty Co.*, (D.C. W. P.) 1960, 183 F. Supp. 478, 483, the authorities are again reviewed.

U.S. v. *Bess*, 357 U.S. 55, 56, 78, S.C.T. 1057, 1058, holds that it would be anomalous to review as "property", subject to lien, money never within the contractor's reach to enjoy.

In *Aequilino d/b/a Home Maintenance Co.* v. *U.S.*, 10 N.Y. 2d 271, 275, 280, 282, 176 N.E. 2d 826, 832, on remand by the United States Supreme Court in 363 U.S. 109, the Court of Appeals and Errors denied recovery, and held:

> "Our conclusion, then, is that, as a matter of New York law, a contractor does not have a sufficient beneficial interest in the moneys, due or to become due

from the owner under the contract, to give him a property right in them, except insofar as there is a balance remaining after all subcontractors and other statutory beneficiaries have been paid. This being so, it follows that the tax lien herein asserted by the Government against the property of the contractor —taxpayer is ineffective to reach such moneys and that the plaintiff subcontractors are entitled to the Court deposited fund."

In *Gotham Sand and Stone Corp.* v. *Nuns of St. Dominic,* 224 N.Y.S. 2d 317 (N.Y. Sup. Ct. 1962), the plaintiffs were materialmen of the subcontractor, Grefe and Brennan, who had abandoned the work so that the contractor had to complete the job. The contractor had certain funds on hand and the Government filed a notice of lien prior to the date the materialmen filed their lien. In determining the priorities to the fund the Court held:

"* * * it follows that the subcontractor taxpayer, * * * does not possess a beneficial interest in the fund due from the contractor except insofar as there is a balance remaining after all the designated statutory beneficiaries have been paid. Since the payments due the plaintiff and the other lienor, * * * exceed the balance held by the contractor, the tax lien of the Government is ineffective to reach the fund."

The Court allowed summary judgment for the plaintiffs.

The following other cases are determinative: *Central Surety & Insurance Corp.* v. *Martin Infante Co.,* 272 F. 2d 231, 234-235. *Van Etten* v. *N. Y. Natural Gas Corporation U.S.A. intervenor,* 192 F. Supp. 837. *U. S.* v. *Paul Meyer et al,* C.C.A. 7, 199 F. Supp. 508. *U. S.* v. *Holman Lumber Co.,* 208 F. 2d 113, 114.

CONCLUSION.

The decision of the Circuit Court of Appeals of the Seventh Circuit that Alsip had property of the taxpayers in its possession at the time of the Government's lien for taxes we believe to be contrary to the holdings of the other circuits above set forth. We believe this to be a proper reason for the granting of the writ of certiorari.

We further believe that the decision of the Circuit Court of Appeals of the Seventh Circuit is unjust.

Defendant Alsip attempted to do justice by the ordinance of February 20, 1960. The question is, shall the taxpayers of the Village of Alsip be compelled to pay twice for an improvement when the taxpayers had not paid for it and could not do so? Alsip contends that if the taxpayers had money coming from Alsip, it had a right to pay it to Santry when the taxpayers did not pay him.

Defendant Alsip contends that the authorities submitted by the Government that it had property belonging to taxpayers are not factually in point and hence are not controlling authorities on the questions in this case. It contends that the Illinois cases show it had no property of taxpayers in its hands when the liens attached or judgment was taken.

Defendant Alsip contends that there is no showing which requires the payment of interest and that the present judgment of the Circuit Court of Appeals is contrary to the decisions of this Court and to all principles of justice and equity.

Wherefore, Petitioner, Defendant Alsip, prays that the Court issue the Writ of Certiorari and that it take jurisdiction of the case and reverse said judgment and find that the defendant Alsip is liable only for the $6,381.06 and for such portions of the $32,000.00 left to be refunded by the City of Chicago and those amounts which are, in fact, refunded by the City of Chicago under the terms of the Circuit Court of Appeals. The Court should find further that Alsip is and has been willing to turn said sums over to the Government and no interest should be charged. Permission should be given to correct the defendant's pleadings.

Respectfully submitted,

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Blue Island, Illinois 60406,
Attorney for Petitioner.

APPENDIX A

OPINION OF THE COURT BELOW IN THE UNITED STATES COURT OF APPEALS

No. 14649 SEPTEMBER TERM, 1964—APRIL SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VILLAGE OF ALSIP,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 28, 1965

Before HASTINGS, *Chief Judge* and SCHNACKENBERG and KNOCH, *Circuit Judges.*

HASTINGS, *Chief Judge.* This action was brought by United States of America against defendants Alfred H. Rado and Joyce B. Rado (taxpayers), doing business as Homecraft Construction Company, and defendant Village of Alsip, Illinois (Alsip), pursuant to Section 7401 of the Internal Revenue Code of 1954, 26 U.S.C.A. It sought to recover unpaid income, withholding and Federal Insurance Contribution Act taxes which had been assessed against taxpayers.

Default judgment was entered against taxpayers in the amount of $130,927.05, plus interest and costs. Government moved for summary judgment against Alsip. This was granted in the amount of $65,324.50, plus interest from September 20, 1957 to January 13, 1964 of $24,751.73. The

summary judgment order provided that $6,381.06, held by the clerk of the district court, be turned over to Government in partial satisfaction of the judgment and that Alsip could satisfy the judgment to the extent of $32,000 from proceeds to be paid to it from the City of Chicago. Alsip appealed.

The summary judgment against Alsip was entered on the complaint, answer, two discovery depositions and exhibits therein and an exhibit filed by Alsip. This appeal is concerned only with the summary judgment against Alsip.

Prior to 1955, taxpayers purchased real property within the geographical limits of Alsip as a site for a residential subdivision. Taxpayers and Alsip desired to have the City of Chicago Water System extended into Alsip. Alsip advanced $48,000 to Chicago for the purpose of having Chicago extend its water system to the boundary between Chicago and Alsip. $32,000 of this amount was advanced by taxpayers to Alsip.

On November 15, 1955, Chicago and Alsip entered into a contract which provided that Alsip was to be repaid the $48,000, without interest, in amounts not to exceed 25% of the net monthly water billings from Chicago to Alsip. Taxpayers were to be refunded the $32,000 advanced by them as Alsip received payments from Chicago.

On October 15, 1955, taxpayers contracted with Peter Santry, doing business as Santry Construction Company (Santry), for the extension of the water main from the boundary line between Chicago and Alsip to taxpayers' subdivision. Alsip supervised the bidding which resulted in this contract and required Santry to post a completion bond with Alsip. The contract included the following provision:

> "It is understood the contractor (Santry Construction Company) is to look to the Homecraft Construction Company [taxpayers], 2136 West 51st Street, Chicago 9, Illinois, herein called the Owner, for payment of said work, and that the Village of Alsip is not to be liable in any manner for payment of said construction."

Alsip agreed to purchase this water main to be built by Santry from taxpayers at an amount Alsip's engineers certified to be due Santry. On or about October 6, 1955, Alsip's trustees adopted a resolution which provided for a bond issue to finance this purchase.

Upon completion of the water main extension, an engineer of Alsip certified that $59,644.58 was due Santry. Taxpayers paid Santry $28,600 but did not pay the balance, which was subsequently paid by Alsip.

On September 20, 1957, the District Director of Internal Revenue served on Alsip a notice of levy that a lien existed on all property or rights to property belonging to taxpayers and that any property, rights to property, moneys, credits, bank deposits or other obligations which Alsip had of taxpayers or owed to taxpayers were levied upon and seized for satisfaction of tax liabilities of taxpayers in the amount of $51,655.33, or such lesser sums as Alsip was indebted to taxpayers.

On December 12, 1957, a second notice was served on Alsip demanding an amount necessary to satisfy an additional liability of taxpayers of $29,269.22, or such lesser sum as Alsip was indebted to taxpayers.

At a special meeting on September 20, 1958, Alsip approved a waterworks bond issue to pay the cost of purchasing the water supply system from taxpayers. The bonds were issued December 1, 1958 in the principal amount of $50,000. Alsip provided that the additional money it was to pay taxpayers was to come from the water fund. Alsip had previously agreed to pay taxpayers $59,644.58.

On January 15, 1960, the District Director of Internal Revenue served final demands on Alsip, again demanding the sums due taxpayers.

By a resolution of February 20, 1960, the board of trustees of Alsip recognized the contract right of taxpayers to receive from Chicago the $32,000 taxpayers had advanced to Chicago. The resolution stated that the Internal Revenue Service was the beneficial owner of this contract right, valued in the resolution at $27,898.94.

This resolution provided that since taxpayers had paid Santry only $28,600 of the $59,644.58 owed, Alsip would pay Santry the remaining sum of $31,044.58 out of proceeds of the bond issue. In February, 1960, Alsip paid Santry this amount.

Government's claim against Alsip was for $91,644.58. This amount included $32,000 due taxpayers from Chicago and the $59,644.58 Alsip agreed to pay taxpayers for the purchase of the water system. Government conceded offsets to Alsip in the amount of $26,320.

Judgment was entered on Government's motion for summary judgment for Government's entire claim of $65,324.58, plus $24,751.73 interest at 6% from September 20, 1957 to January 13, 1964, for a total of $90,076.31.

The judgment against Alsip was computed as follows:

1.	$32,000	The sum advanced by taxpayers through Alsip to Chicago for extension of Chicago's water main.
2.	$59,644.58	This amount was certified by Alsip's engineer to be due Santry for construction of the water main extension and for convenience can be broken down as follows: A. $28,600 Paid by taxpayers to Santry. B. $31,044.58 Paid by Alsip to Santry.
3.	$91,644.58	Total
4.	($26,320)	This figure represents all offsets claimed by Alsip which taxpayers owed to Alsip and is broken down as follows: $15,300 for unpaid tap-on fees, $1,220 for repairs to improvements and $9,800 for installation of street lights.
5.	$65,324.58	Balance
6.	$24,751.73	Interest as above set out.
7.	$90,076.31	Total summary judgment.

The summary judgment order provided that $6,381.06, paid into the district court by Alsip for the benefit of the Internal Revenue Service, be turned over to Government

in partial satisfaction of the judgment. This amount represents $4,101.06 Alsip received from Chicago pursuant to Chicago's agreement to repay the $32,000 (item No. 1, *supra*) advanced by taxpayers through Alsip and $2,280 which Alsip owed taxpayers pursuant to its agreement to purchase the water main extension built by Santry, less offsets taxpayers owed Alsip. (Item No. 2A minus item No. 4, *supra*).

We are thus not concerned with item No. 2A since it has been paid by Alsip to Government.

There is little dispute concerning item No. 1 ($32,000), since Alsip concedes Government is to receive this money as Alsip receives it from Chicago. Alsip states that it "has not refused to turn over such refunds [from Chicago] but stands ready and willing to turn them over [to Government] when received."

The summary judgment against Alsip included this $32,000 and provided that Alsip "may" satisfy this sum as it is received from Chicago.

Alsip did not owe this sum to taxpayers and was obligated to pay this money to taxpayers only as it was received from Chicago. As stated by Government in its brief, "Here, the payments received from Chicago were attributable to moneys advanced by the taxpayers themselves—not merely by others for their benefit. The Village [Alsip] has no colorable claim of right to ownership of these payments under any theory or equity. The record indicates undeniably that the Village [Alsip] was a mere conduit through which the funds were advanced by the taxpayers to the City of Chicago and had no right to retain to its own use and possession the repayments made by Chicago of this advance."

Since Alsip was not liable to taxpayers, independent of receiving payments from Chicago, the last paragraph of the order of the district court should be modified to read as follows:

> Ordered, Adjudged, and Decreed that the Village of Alsip shall satisfy this judgment to the extent of $32,000 as this amount is received from the City of Chicago under an agreement whereby this amount is to be paid to the Village of Alsip over a period of time. To the extent, if any, that the City of Chicago

does not pay $32,000 to the Village of Alsip, the above judgment of $65,324.58 shall be reduced by such amount.

The only item in the summary judgment order which Alsip contends it does not owe Government is the $31,044.58 it paid to Santry (item No. 2B). The events surrounding this payment, set out *supra*, are as follows: taxpayers contracted with Santry to construct a water main-extension; this contract provided that taxpayers and not Alsip were to be liable to Santry for payment of this construction; Alsip agreed to purchase this water main extension from taxpayers; taxpayers paid Santry $28,600 of a total of $59,644.58 due for the construction; and Alsip adopted a resolution and pursuant thereto paid Santry the unpaid amount owed Santry by taxpayers, $31,044.58.

Alsip contends it was not legally obligated to pay this sum to taxpayers and thus it had no property or rights to property of taxpayers to which Government's lien could attach. In the alternative, Alsip argues that assuming, *arguendo*, it was obligated to taxpayers, Santry had a lien against taxpayers superior to Government's and thus Alsip's payment to Santry was proper. State law determines whether Alsip was indebted to taxpayers. *Aquilino* v. *United States*, 363 U.S. 509, 512-514 (1960); *In re Halprin*, 3 Cir., 280 F. 2d 407, 409-410 (1960).

Government states that its theory does not rely upon oral or written agreements between Alsip and taxpayers. Rather, Government relies on Alsip's alleged ratification of its agreement to purchase the water system from taxpayers.

Government contends the following constituted ratification by Alsip: the resolution of October 6, 1955, proposing the bond issue to finance the purchase; approval of the bond issue on September 20, 1958; the issuance of bonds on December 1, 1958; the February 20, 1960 resolution authorizing the disbursement of a portion of the purchase price to Santry; and the disbursement of this sum to Santry.

Alsip argues that the alleged ratification is not binding upon it because Ill. Rev. Stat. ch. 24, § 9-47, which was in effect at the time the alleged indebtedness of Alsip to

taxpayers was created, provided that a yea and nay vote of the board of trustees be taken and recorded in municipal records in order to create a liability against a municipality, and that there is no evidence that yea and nay votes were taken and recorded by Alsip in this case. In support of its argument Alsip cites *The People* v. *C. & N.W. Ry. Co.*, 396 Ill. 466, 468-469, 71 N.E. 2d 701 (1947).

Government contends this Illinois statute and case apply only to *cities* and not to *villages*. Alsip is a village.

We do not decide this issue. Alsip did not challenge its own actions and resolutions in the district court which are relied upon by Government for ratification. This question is raised for the first time in this appeal.

Concerning Alsip's obligations to taxpayers, the district court had before it the following: Alsip's answer to Government's complaint admitting that "[a]lthough * * * Santry * * * was to look to * * * taxpayers for payment, the funds were ultimately to come from * * * Alsip which was to purchase the water main extension within its geographical limits from * * * taxpayers * * *"; Alsip's answer to interrogatories admitting that "a motion or resolution was passed by the Village Trustees on or about October 6, 1955, relating to a bond issue to finance the purchase of the water main extension"; Alsip's accounting records admitted in evidence and indicating the passage of the water works bond issue on September 20, 1958, issuance of these bonds on December 1, 1958 and provision for payment of the additional $10,000 to taxpayers from the water fund.

On the basis of the evidence before the district court, we find no error in its determination that no factual issue existed as to whether Alsip was obligated to pay taxpayers for the water works system.

We hold Alsip's contention that under Illinois law it was not obligated to taxpayers since there was no evidence it followed the Illinois statute, above referred to, is not properly before us, *United States* v. *Tyrrell*, 7 Cir., 329 F. 2d 341 (1964). We will not set aside the summary judgment on an issue not before the district court.

In the alternative, we hold that assuming, *arguendo*, Alsip had raised the above issue in the district court, it

is estopped to deny liability to taxpayers and is liable in assumpsit to taxpayers.

Under Illinois law, municipalities cannot be estopped from denying liability on contracts they had no power to make, *DeKam* v. *City of Streator*, 316 Ill. 123, 136-137 (1925), but they can be estopped to deny liability on contracts which are within their power to make, even though such contracts are irregularly made. *Branigar* v. *Village of Riverdale*, 396 Ill. 534, 542, 72 N.E. 2d 201 (1947).

Alsip had the power to agree to and provide for construction of the water main extension and to agree to purchase it. See Ill. Rev. Stat. ch. 24, § 3-8 (1955). In May, 1960, Alsip took possession of the constructed water main extension. We hold it is now estopped to deny its liability to taxpayers for the agreed purchase price.

Further, Alsip was liable to taxpayers in an action in assumpsit. In Illinois, an action in assumpsit lies for money had and received when one party obtains money belonging to another, which in equity and good conscience it has no right to retain. *Kearney* v. *Webb*, 278 Ill. 17, 115 N.E. 844 (1917); *First Nat. Bank* v. *Gatton*, 172 Ill. 625, 50 N.E. 121 (1898). Such action will lie in the absence of privity, *ibid.*, and may be maintained against a municipality. *Highway Comrs.* v. *Bloomington*, 253 Ill. 164 (1912); *Conway* v. *City of Chicago*, 237 Ill. 128, 86 N.E. 619 (1908).

Alsip issued bonds in the principal amount of $50,000 to pay part of the purchase price of the constructed water system and Alsip's books of account indicate that the money so collected was held for that purpose. This money was owned by Alsip to taxpayers and would afford the basis for an action in assumpsit.

In the alternative, Alsip contends Santry had a lien against taxpayers for this money, superior to Government's lien and Alsip rightfully paid this money to Santry.

Ill. Rev. Stat. ch. 82, § 23 was in effect at all relevant times and provides, in essence, that any person who provides material or labor to any contractor having a contract for public improvement "shall have a lien on the money * * * due or to become due the contractor." The

lien provided by this section is not on the improvement itself, as a mechanic's lien, but is on the fund due the contractor. *McMillan* v. *Casey Co.*, 311 Ill. 584, 587 (1924).

Alsip argues that taxpayers were the contractors, Santry the subcontractor which furnished materials and labor and that Santry thereby had a lien superior to that of Government, under Illinois law.

Government "concedes that under normal construction contracts, the main contractor has no right to the payments for the work completed except to the extent that his right to payment exceeds the claims of subcontractors for labor and materials supplied for that same work." However, Government asserts this is not a normal construction contract and Santry waived its right to a lien on the proceeds from Alsip. We agree.

As set out *supra*, the contract between taxpayers and Santry contained the following clause:

> "It is understood the contractor (Santry Construction Company) is to look to the Homecraft Construction Company [taxpayers], 2136 West 51st Street, Chicago 9, Illinois, herein called the Owner, for payment of said work, and that *the Village of Alsip is not to be liable in any manner for payment of said construction.*" (Emphasis added.)

We hold this clause constituted a waiver of Santry's rights to payments by Alsip to taxpayers for the water main extension. As a result of this waiver, Santry was relegated to the position of a general creditor of taxpayers.

Alsip contends the district court erred in assessing interest against it and cites several Illinois cases to support this contention.

Section 6332(b) of the Internal Revenue Code of 1954, 26 U.S.C.A., provides:

> "(b) Penalty for Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy,

upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and *interest* on such sum at a rate of 6 percent per annum from the date of such levy." (Emphasis added.)

Section 6332 is enforceable against municipalities. *Sims* v. *United States,* 359 U.S. 108 (1959); *Commonwealth of Massachusetts* v. *United States,* 1 Cir., 296 F. 2d 336 (1961); *Hoye* v. *United States,* 9 Cir., 277 F. 2d 116 (1960).

While Alsip is subject to interest charges, we hold it is not liable for the entire amount of interest assessed by the district court ($24,751.73). The district court computed the interest at 6% from September 20, 1957 (the date the District Director of Internal Revenue served the notice of levy on Alsip) to January 13, 1964 (the date of the judgment order by the district court) on the entire judgment of $65,324.58. Thus, Alsip was charged interest on the $32,000 which it was to receive from Chicago. We held, *supra,* that Alsip was liable to Government for this $32,000 only as it received repayments from Chicago. Accordingly, we hold that Alsip should not be charged interest on this sum and that the amount of interest should be reduced to $12,626.82.[1]

This cause is remanded to the district court with directions to modify its judgment consistent with the views expressed herein, and such judgment as so modified is affirmed.

AFFIRMED AS MODIFIED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

[1] Alsip received $4,101.06 of the $32,000 from Chicago prior to the commencement of the action in the district court. We have not charged Alsip interest on this sum since Alsip, by resolution dated February 20, 1960, provided that the money "be disbursed directly to the Bureau of Internal Revenue, as the net amount of cash due under the levies heretofore filed."